(3)

No. 84-1580

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH INADI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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1. Respondent has not provided any basis for declining review in this case. Respondent does not dispute the fact that the courts of appeals are sharply divided about the application of the Confrontation Clause to co-conspirator statements (see Pet. 8-10).[1] Nor does respondent deny that similar division and uncertainty exist at the state level (see Pet. 10-11).

Moreover, contrary to respondent's suggestion, the practical importance of the first issue presented in this case is evident. Respondent argues (Br. in Opp. 5) that the court of

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[1]In addition to the cases cited in the petition, the decision below flatly conflicts with *United States* v. *Molt*, No. 85-1085 (7th Cir. Apr. 1, 1985), slip op. 2-3 (admission of co-conspirator statements without showing of unavailability did not violate Confrontation Clause; Confrontation Clause imposes no requirements beyond co-conspirator rule), and *Boone* v. *Marshall*, No. 84-3536 (6th Cir. Apr. 29, 1985), slip op. 3-4 (same).

appeals' holding "concerns only the application of the Confrontation Clause to statements admissible under Rule 801(d)(2)(E) [the co-conspirator rule]" and not the hearsay exceptions in Fed. R. Evid. 803. Even if respondent were correct, the effect on co-conspirator statements is alone more than enough to justify review. The decision of the court of appeals dramatically restructures the traditional co-conspirator rule by requiring the government to produce the co-conspirator for cross-examination or prove that he is unavailable to testify before his out-of-court statements may be introduced. "The great importance of coconspirator statements in federal practice is attested by the fact that Rule 801(d)(2)(E) is *by far the single most cited provision in Article VIII*, judging from the reported cases." 4 D. Louisell & C. Mueller, *Federal Evidence* § 427, at 331 (1980) (emphasis added). The court of appeals' decision is thus a matter of unmistakable importance.

Furthermore, respondent's constricted interpretation of the court of appeals' holding is plainly unsound. Respondent relies (Br. in Opp. 8-12) on the fact that co-conspirator statements are not hearsay under the Federal Rules of Evidence (Rule 801(d)(2)(E)). But the cornerstone of the court of appeals' decision (see Pet. App. 12a) is dictum in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), concerning the application of the Confrontation Clause to *hearsay*. In *Roberts*, the Court wrote (*id.* at 65 (emphasis added)):

> The Confrontation Clause operates in two separate ways to restrict the range of admissible *hearsay*. First, * * * [i]n the usual case * * *, the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.

The Court reiterated (*id.* at 66 (emphasis added)):

> [W]hen a *hearsay* declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable.

Thus, if it matters for present purposes that co-conspirator statements are not hearsay under the Federal Rules of Evidence, it would follow that the *Roberts* dictum does not apply, and the principal, if not exclusive, support for the court of appeals' holding would be removed.

The Third Circuit understood this point and has firmly rejected reliance on the status of co-conspirator statements as non-hearsay. In *United States* v. *Caputo*, No. 82-1791 (Mar. 29, 1985), slip op. 14, in which the court reversed a conviction based on *Inadi*, Judge Higginbotham, *Inadi's* author, wrote: "The mere fact that the drafters of the Federal Rules opted to make coconspirator statements an exception to the definition of hearsay, rather than an exception to the rule excluding hearsay, Fed. R. Evid. 802, is of no consequence in applying the Confrontation Clause." This demonstrates that the court of appeals' reasoning applies to all traditionally admissible categories of hearsay as well as to co-conspirator statements.

We wish to make it clear that we agree with respondent, and disagree with the court of appeals, that the status of co-conspirator statements as non-hearsay is indeed significant for present purposes. Many co-conspirator statements, including many of those at issue in this case (see Pet. App. 4a-5a), are not introduced for the truth of the matter asserted and thus would fall outside the hearsay rule (see Fed. R. Evid. 801(c)) even without the special exemption of Fed. R. Evid. 801(d)(2)(E). See 4 D. Louisell & C. Mueller, *supra*, § 427, at 357-362. And as this Court recently explained, admission of non-hearsay "raises no Confrontation Clause concerns." *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985), slip op. 5.

Respondent contends (Br. in Opp. 5-6) that the court of appeals' decision is "much narrower" than suggested in the petition because proof of unavailability may not be necessary "where the 'utility' of trial confrontation" is very "remote" Pet. App. 12a n.4, quoting *Roberts*, 448 U.S. at 65 n.7. At best, however, this is a very narrow exception to the court of appeals' holding; it appears to be little more than a variant of the harmless error rule.[2]

Respondent is also wrong in asserting (Br. in Opp. 12) that the court of appeals' holding will place only a "slight" burden on the government. At a minimum, the court of appeals' holding "increases the number of declarants who must mechanically appear at trial and thereby complicates and protracts the proceedings." *Caputo*, slip op. 24 (Sloviter, J., dissenting). But we think that the court of appeals' decision may have graver implications. Non-testifying co-conspirators are frequently hostile to the prosecution and are sometimes still in league with the defendant. Thus, it is entirely predictable that many co-conspirators will not cooperate with prosecutorial efforts to produce them at trial or prove their unavailability. Even where their right and intention to claim the Fifth Amendment privilege are apparent, they will often refuse to assist the government by executing affidavits to that effect. And even when subpoenaed to appear at trial, they will fail to appear—as did Lazaro in this case—claiming various excuses. The burden

[2]The dictum in *Roberts* (448 U.S. at 65 n.7) on which the court of appeals relied was based in turn on *Dutton* v. *Evans*, 400 U.S. 74 (1970), where the plurality opinion rejected as "wholly unreal" the suggestion that the defendant might have profited from cross-examination of the declarant whose out-of-court statement was introduced against him (*id.* at 89). Two of the five members of the majority, including Justice Blackmun, the author of *Roberts*, thought that the case could have been decided on harmless error grounds (*id.* at 90-93) (Blackmun, J., concurring).

on the prosecution of securing the presence of these declarants in the courtroom or of conducting a thorough search sufficient to establish that they have disappeared and are thus unavailable, and on the courts of litigating the issue, will be anything but "slight," as the controversy in *Roberts* over the unavailability of the declarant there demonstrates.

We also doubt that the court of appeals has thought through the consequences of its ruling when the co-conspirator/declarant is produced and does not claim the Fifth Amendment privilege. The court of appeals held that the co-conspirator must be "produce[d] * * * for cross-examination." Pet. App. 12a; see also *Caputo*, slip op. 15. Does this mean that the government must conduct a direct examination of a co-conspirator who may well be in the defense camp? What questions must be asked? If the court of appeals' decision requires the prosecution to do anything more than produce the co-conspirator, it constitutes a severe intrusion upon prosecutorial prerogative.[3] On the other hand, if mere production is all that is required, why must the prosecution shoulder the burden of producing a

[3]Non-cooperating co-conspirators will often deny or offer an exculpatory explanation for incriminating statements made in furtherance of the conspiracy. Where this is so, their testimony will not be wanted by the prosecution. Faced with a situation in which the prosecution has no desire to conduct a direct examination, a district court would be well advised to reverse the order of interrogation (Fed. R. Evid. 611). The defense would then have the opportunity on direct examination to elicit an exculpatory denial or explanation of the incriminating statements, and the prosecution would be allowed to cross-examine. However, if this is the result anticipated by the court of appeals, we fail to see why the defense should not be required to arrange for the co-conspirator's presence rather than placing the burden on the government.

On the other hand, if the court of appeals meant to require the government to conduct a direct examination of these unwanted witnesses, disruption of the prosecution's case and jury confusion would be likely to result. In many instances, the government will have to seek leave to question the co-conspirator/declarant as a hostile witness (Fed. R. Evid. 611(c)). In effect, the government will have to cross-examine

witness who is equally available to both sides and may indeed be cooperating with the defense? And if the government does not question the co-conspirator/declarant on direct, what form will the cross-examination be permitted to take?

2. We will not address at length respondent's defense of the court of appeals' decision. It is worth noting, however, that respondent has not even attempted to explain what would be gained by re-examining under the aegis of the Confrontation Clause the traditional treatment of declarant availability in the exceptions to the hearsay rule.

3. Finally, respondent contends (Br. in Opp. 13-14) that the government waived its right to object to the relief ordered by the court of appeals—a new trial—because the government did not address this issue until after the court's decision was announced. This is surely an extreme application of the rule that arguments ordinarily should not be raised for the first time on rehearing. Until the court of appeals handed down its decision, the government did not know whether the court would find a Confrontation Clause violation, much less that it would order what in our view is entirely inappropriate, wasteful, and excessive relief. We are not aware of a rule requiring appellees to anticipate and brief all forms of unwarranted relief that an appellate court might impose.

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the co-conspirator about his out-of-court statements before the anticipated exculpatory denial or explanation is elicited. Indeed, the government will be in the position of having to conduct a cross-examination even though the defense will be under no obligation to question the witness at all. Such a confused procedure would be "at odds with the Confrontation Clause's very mission—to advance 'the accuracy of the truth-determining process in criminal trials.' " *Tennessee* v. *Street*, slip op. 6, quoting *Dutton* v. *Evans*, 400 U.S. at 89.

For these reasons and those set out in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

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